

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JEHAN ZEB MIR,

Plaintiff,

v.

KIMBERLY KIRCHMEYER, et al.,

Defendant.

Case No.: 12-cv-2340-GPC-DHB

**ORDER GRANTING PLAINTIFF'S
MOTION FOR LEAVE TO AMEND
THIRD AMENDED COMPLAINT**
[ECF No. 90]

Before the Court is Plaintiff's motion for leave to amend his Third Amended Complaint ("TAC," ECF No. 61). (ECF No. 90.)¹ The Parties have fully briefed the motion. (ECF Nos. 92 and 95.) The Court deems Plaintiff's motion suitable for disposition without oral argument pursuant to Civil Local Rule 7.1(d)(1). Having reviewed the parties' submissions and the applicable law, and for the reasons set forth below, the Court **GRANTS** Plaintiff's motion.

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¹ Plaintiff filed an *Ex Parte* Application to Amend Third Amended Complaint to Add Parties. (ECF No. 90.) Per the Court's order dated June 11, 2015, the Court construes this as Plaintiff's motion to amend his operative complaint. (ECF No. 91.)

BACKGROUND

On September 25, 2012, Plaintiff Jehan Zeb Mir (hereinafter “Plaintiff”), proceeding *in propria persona*, filed this lawsuit in federal court alleging the California Medical Board wrongfully took disciplinary actions against Plaintiff’s physician’s and surgeon’s certificate. (ECF No. 1.) On January 17, 2013, Plaintiff filed a First Amended Complaint (“FAC”) seeking injunctive and declaratory relief. (ECF No. 8.) The FAC named Defendants Medical Board of California; Linda Whitney, Executive Director; and Sharon Levine, M.D., President. (*Id.*)

Defendants then filed a motion to dismiss Plaintiff’s FAC, (ECF No. 13), and Plaintiff filed a motion for preliminary injunction. (ECF No. 17.) On March 19, 2013, the Court denied Plaintiff’s motion for preliminary injunction. (ECF No. 23.) On May 2, 2013, Plaintiff filed a motion for reconsideration of the Court order denying Plaintiff’s motion for preliminary injunction. (ECF No. 26.) On May 8, 2013, the Court granted Defendants’ motion to dismiss Plaintiff’s FAC and denied Plaintiff’s motion for reconsideration, but granted Plaintiff leave to amend his complaint. (ECF No. 28.)

On December 31, 2013, Plaintiff filed a Second Amended Complaint (“SAC”), *nunc pro tunc* to December 24, 2013, against Defendants Kimberly Kirchmeyer, Interim Executive Director and Deputy Director of the Medical Board of California; Linda K. Whitney, Executive Director; and Sharon Levine, M.D., President. (ECF No. 44.) On February 21, 2014, Defendants filed a motion to dismiss Plaintiff’s SAC. (ECF No. 50.) On May 30, 2014, the Court granted in part and denied in part Defendants’ motion to dismiss Plaintiff’s SAC, and granted Plaintiff leave to amend his complaint. (ECF No. 59.)

On July 11, 2014, Plaintiff filed a Third Amended Complaint (“TAC”), the current operative complaint. (ECF No. 61.) He again named as Defendants Kimberly Kirchmeyer, Interim Executive Director, Deputy Director, and Executive Director of the Medical Board of California, in her personal and official capacities; Linda K. Whitney, Executive Director,

1 in her personal capacity; and Sharon Levine, M.D., President, in her personal and official
2 capacities. (*Id.*) On August 8, 2014, Defendants filed a motion to dismiss Plaintiff's TAC.
3 (ECF No. 65.)

4 Plaintiff's TAC alleged two claims for relief: (1) "Permanent Injunction"; and (2)
5 "Permanent Injunction for Unconstitutional Statute Facial Unconstitutionality of California
6 Business & Profession Code 2327 (sic) and Rules of California Court of Appeal." (*Id.* at
7 72 and 88.) The Court dismissed Plaintiff's second claim with prejudice. (ECF No. 72.)
8 Under Plaintiff's first claim for relief—the remaining claim—Plaintiff makes the following
9 primary allegations: Plaintiff had a property interest in his medical license, protected by
10 the U.S. Constitution; Defendants in bad faith brought false fraudulent charges of
11 misdiagnosis; Defendants denied Plaintiff due process; Defendants refused to consider
12 additional evidence and failed to provide Plaintiff the opportunity for a full and fair
13 hearing; Defendants conducted a sham administrative hearing; Defendants committed
14 extrinsic fraud; Defendants misled the California Superior Court; and Defendants
15 disobeyed the Superior Court decisions. (ECF No. 61 ¶¶ 263-344.)

16 Plaintiff's TAC seeks: (1) an injunction permanently enjoining Defendants from
17 imposing disciplinary action against Plaintiff for the wrongful diagnosis charges raised in
18 the original 2003 Accusation and subsequent amended accusations against him, (*id.* at 90);
19 (2) full restoration of his medical license as it existed prior to 2007, (*id.* at 91); (3) a
20 declaration of Plaintiff's rights in relation to Defendants alleged unconstitutional behavior,
21 (*id.*); (4) a declaration that the California Business and Professions Code section 2337 and
22 the Rules of the California Court of Appeal are unconstitutional. (*Id.* at 92.)

23 On June 6, 2015, Plaintiff filed his instant *Ex Parte* Application to Amend TAC to
24 Add Parties, which the Court construes as Plaintiff's motion to amend his TAC. (ECF Nos.
25 90 and 91.) On July 7, 2015, Defendants filed their opposition to Plaintiff's motion. (ECF
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No. 92.) On July 24, 2015, Plaintiff filed his reply to Defendants' opposition. (ECF No. 95.)

LEGAL STANDARD

Under Federal Rule of Civil Procedure 15(a), leave to amend a complaint after a responsive pleading has been filed may be allowed by leave of the court and “shall freely be given when justice so requires.” *Foman v. Davis*, 371 U.S. 178, 182 (1962) (quoting Fed. R. Civ. P. 15(a)). Granting leave to amend rests in the sound discretion of the trial court. *Int’l Ass’n of Machinists & Aerospace Workers v. Republic Airlines*, 761 F.2d 1386, 1390 (9th Cir. 1985). This discretion must be guided by the strong federal policy favoring the disposition of cases on the merits and permitting amendments with “extreme liberality.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (citation and internal quotation marks omitted). This liberality is “applied even more liberally to pro se litigants.” *Eldridge v. Block*, 832 F.2d 1132, 1135 (9th Cir. 1987). “This liberality in granting leave to amend is not dependent on whether the amendment will add causes of action or parties.” *DCD Programs Ltd.*, 833 F.2d at 186; *but see Union Pac. R.R. Co. v. Nev. Power Co.*, 950 F.2d 1429, 1432 (9th Cir. 1991) (In practice, however, courts more freely grant plaintiffs leave to amend pleadings in order to add claims than new parties).

Because Rule 15(a) favors a liberal amendment policy, the nonmoving party bears the burden of demonstrating why leave to amend should not be granted. *Genentech, Inc. v. Abbott Labs.*, 127 F.R.D. 529, 530-31 (N.D. Cal. 1989). In assessing the propriety of an amendment, courts may consider several factors: (1) undue delay; (2) bad faith or dilatory motive; (3) repeated failure to cure deficiencies by amendments previously permitted; (4) prejudice to the opposing party; and (5) futility of amendment. *Foman*, 371 U.S. at 182; *United States v. Corinthian Colls.*, 655 F.3d 984, 995 (9th Cir. 2011). These factors are not equally weighted; the possibility of delay alone, for instance, cannot justify denial of leave to amend, *DCD Programs*, 833 F.2d at 186, but when combined with a showing of

1 prejudice, bad faith, or futility of amendment, leave to amend will likely be denied. *Bowles*
 2 *v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999). The single most important factor is whether
 3 prejudice would result to the non-movant as a consequence of the amendment. *William*
 4 *Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1053 n.68 (9th Cir.
 5 1981).

6 DISCUSSION

7 Plaintiff seeks leave to amend the TAC “to add current members of the [Medical
 8 Board of California] in their official and individual capacities as defendants so that
 9 requested relief can be granted.” (ECF No. 90 at 2.) Plaintiff states that during the Early
 10 Neutral Evaluation (ENE) Conference², Defendants represented that Defendant Whitney
 11 had retired from her position as Executive Director of the Medical Board and Defendant
 12 Levine was no longer President of the Medical Board (although she remains a Board
 13 member) and, as such, neither can confer Plaintiff’s requested relief to reinstate his medical
 14 license and to expunge his record of discipline. (*Id.* at 1-2.) Plaintiff argues that “only
 15 current members of the [Medical Board] can confer all of the relief requested” and that the
 16 current defendants “should not be left to bear the brunt of the unconstitutional actions
 17 perpetrated by others.” (*Id.* at 2 and 4.)

18 Defendants oppose Plaintiff’s motion on the grounds that (1) amendment would be
 19 futile; (2) plaintiff has unduly delayed filing a complaint and has already filed three
 20 amended complaints; and (3) Plaintiff is acting in bad faith and granting leave would
 21 prejudice Defendants. (ECF No. 92 at 3-6.) The Court considers Defendants’ arguments
 22 in turn.

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26 ² The ENE was held on March 4, 2015. (See ECF No. 84.)

1 **I. Futility of Amendment**

2 Defendants contend that Plaintiff's proposed amendment would fail to state a claim
 3 upon which relief can be granted against the proposed defendants. (ECF No. 92 at 4.)
 4 Specifically, Defendants argue that Plaintiff's motion does not provide sufficient facts
 5 showing how specific Medical Board members other than the already named Defendants
 6 would be held liable in their individual or official capacities as Plaintiff does not name
 7 proposed defendants or allege how each proposed defendant harmed him. (*Id.*) Defendants
 8 point out that Plaintiff "merely alleges that these members repeatedly revoked his medical
 9 license without just cause, 'in contempt of the state court orders and in stark violation of
 10 the Plaintiff's constitutional rights.'" (*Id.* (citing ECF No. 90 at 4 and 6).) Plaintiff responds
 11 that the proposed amendment would include "the names and capacities of the parties who
 12 sat along with the Defendants in revoking in the past or are now currently sitting along the
 13 Defendants in enforcing the Decision to revoke prospectively." (ECF No. 95 at 3.)
 14 Plaintiff further states that the allegations against the proposed defendants are "exactly the
 15 same" as the allegations against current Defendants in the TAC. (*Id.*)

16 "[A] proposed amendment is futile only if no set of facts can be proved under the
 17 amendment to the pleadings that would constitute a valid and sufficient claim or defense."
 18 *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). "Denial of leave to amend
 19 on this ground is rare. Ordinarily courts will defer consideration of [futility]
 20 challenges . . . until after leave to amend is granted and the amended pleading is filed."
 21 *Netbula, LLC v. Distinct Corp.*, 212 F.R.D. 534, 539 (N.D. Cal. 2003); *accord Green*
 22 *Valley Corp. v. Caldo Oil Co.*, No. 09cv4028-LHK, 2011 WL 1465883, at *6 (N.D. Cal.
 23 April 18, 2011) (noting "the general preference against denying a motion for leave to
 24 amend based on futility."); *Fair Housing Council of Cent. California, Inc. v. Nunez*, at *4
 25 (E.D. Cal. Jan. 24, 2012) ("denial of leave to amend due to futility is rare"; "courts will
 26 defer consideration . . . until after . . . the amended pleading is filed."). Arguments

1 concerning the sufficiency of the proposed pleadings, even if meritorious, are better left
 2 for briefing on a motion to dismiss. *Lillis v. Apria Healthcare*, No. 12cv0052-IEG, 2012
 3 WL 4760908, at * 1 (S.D. Cal. Oct. 5, 2012).

4 Defendants fail to carry out their heavy burden of establishing why this Court should
 5 depart from the norm—their arguments regarding the sufficiency of the proposed
 6 pleadings, even if meritorious, are more appropriate for briefing on a motion to dismiss.
 7 *Id.*; see also *Pilavskaya v. Henderson*, No. 11cv4075-CAS, 2012 WL 3279517, at *5 (C.D.
 8 Cal. Aug. 9, 2012) (“Whether [] claims are properly pled is better left for a motion to
 9 dismiss.”); *Defazio v. Hollister, Inc.*, No. 06cv1726-GGH, 2008 WL 2825045, at *3 n. 5
 10 (E.D. Cal. July 21, 2008) (“[O]pposition papers arguing the merits of plaintiffs’ proffered
 11 amendments [are] premature in that they require the court to assume that there are no facts
 12 that could support plaintiff’s proposed claims.”).

13 In light of the Ninth Circuit’s liberal policy favoring leave to amend in the *pro se*
 14 context, the Court finds that the sufficiency of Plaintiff’s proposed amendment is more
 15 appropriate for consideration under a motion to dismiss. See *Lillis*, WL 4760908, at *1
 16 (“[T]he Court will not indulge Defendants’ attempt to convert Plaintiff’s motion to amend
 17 into a premature motion to dismiss.”). At this point in the proceedings, the Court cannot
 18 conclude that no set of facts can be proved under the amendments to the pleadings that
 19 would constitute a valid claim and, therefore, finds that granting Plaintiff leave to file an
 20 amended complaint would not be futile.

21 **II. Undue Delay**

22 Defendants argue that Plaintiff fails to demonstrate any grounds supporting his
 23 belated request to amend the TAC. (ECF No. 92 at 4.) Defendants state that more than 18
 24 months have elapsed since the filing of Plaintiff’s SAC, in which Plaintiff added Defendant
 25 Kirchmeyer, “thereby demonstrating that Plaintiff was well aware that [Kirchmeyer]
 26 replaced former Executive Director Whitney,” and that information regarding Medical
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1 Board membership and the duration of Board members' appointed terms is public
2 knowledge." (*Id.* at 5.) As such, Defendants maintain that Plaintiff had all the requisite
3 information necessary to add parties yet unduly delayed until June 6, 2015 to seek leave to
4 amend. (*Id.*) Defendants also argue that Plaintiff's preceding amended complaints also
5 weigh in favor of denying leave. (*Id.* at 6.) Plaintiff responds that he requested leave to
6 amend as soon as he learned from Defendants at the ENE that Defendants cannot confer
7 the relief he seeks. (ECF No. 95 at 4-5.) Plaintiff also points to the Court's April 23, 2015
8 Scheduling Order setting June 22, 2015 as the deadline for motions to join parties, amend
9 the pleadings, or file additional pleadings. (*Id.* at 5.)

10 As to undue delay, the Court looks at whether the moving party unduly delayed in
11 filing their motion. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1388 (9th Cir. 1990). In
12 making such a determination, the court looks at "whether the moving knew or should have
13 known the facts and theories raised by the amendment in the original pleading." *Id.*

14 In light of the Ninth Circuit's liberal policy regarding amendments to pleadings and
15 Plaintiff's compliance with the Court's scheduling deadline regarding filing motions to
16 amend pleadings, the Court finds that Defendants have not sufficiently established the
17 existence of undue delay.

18 **III. Bad Faith and Prejudice**

19 Defendants contend that Plaintiff's proposed amendment is brought in bad faith and
20 unfairly prejudices Defendants "by negating resources previously expended, imposing
21 needless litigation costs . . . and delaying litigation." (ECF No. 92 at 5.) Plaintiff rejects
22 Defendants' notion and maintains that he wants to join current members so that he can
23 receive the relief he seeks. (ECF No. 95 at 8.)

24 The Court finds that granting Plaintiff leave to amend the TAC would not be unduly
25 prejudicial. If Plaintiff's amendments do not sufficiently state a claim upon which relief
26 can be granted—as Defendants argue (*see* ECF No. 92 at 3-4)—Defendants can dispose of

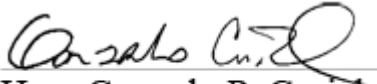
1 Plaintiff's amendments through a motion to dismiss. To deny Plaintiff the opportunity to
2 amend his TAC to include current Board Members would go against the policy of deciding
3 this case on the merits. *See United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981) (In
4 exercising discretion under Rule 15, "a court must be guided by the underlying purpose of
5 Rule 15 to facilitate decision on the merits, rather than on the pleadings or technicalities.")
6 (citing *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957)).

7 CONCLUSION

8 Based on the foregoing, and in light of the Ninth Circuit's extremely liberal policy
9 favoring leave to amend, the Court **GRANTS** Defendant's motion for leave to amend his
10 TAC. Plaintiff shall file his amended complaint on or by **September 25, 2015**. The
11 hearing set for September 4, 2015 shall be **vacated**.

12 IT IS SO ORDERED.

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14 Dated: September 3, 2015


15 Hon. Gonzalo P. Curiel
16 United States District Judge
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